
Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the matter of
Implementation of Section 255 of the
Telecommunications Act of 1996

Access to Telecommunications Services,
Telecommunications Equipment, and
Customer Premises Equipment by
Persons with Disabilities

WT Docket No. 96-198

REPLY COMMENTS OF AMERITECH

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REPLY COMMENTS OF AMERITECH

Summary

As it did in its opening Comments, Ameritech urges the Commission to conclude that it is not authorized under Section 207 or 208 of the Act to award private damages for accessibility complaints under Section 255. This result is compelled by the plain words of Section 255(f) saying that “[n]othing in this section shall be construed to authorize any private right of action to enforce any requirement of this section or any regulation thereunder.” Furthermore, those words are not contradicted by the provision that says “[t]he Commission shall have exclusive jurisdiction with respect to any complaint under this section,” which means only that the Commission will hear all complaints *not* forbidden by the rule against private actions.

Commenters advocating the right to damages rely on a single remark made in the Conference Report — even though nothing comparable may be found in the statute itself — stating that Sections 207 and 208 remain available under Section 255. That statement is obviously inaccurate, however, since everyone now before the Commission concedes that Section 255 abolishes the entire jurisdiction of the federal courts under Section 207. Thus, no matter what it may

say *in the legislative history*, what it actually says *in the law* is that Sections 207 and 208 *are only partially* available. Besides, the rule forbidding private rights of action is mentioned with equal prominence in the next preceding sentence of the Conference Report; so, even if the statute were ambiguous about the relation of Sections 207/208 and the rule against private rights of action, the legislative history, rather than explaining anything, is no less ambiguous than the statute.

Other commenters supporting the right to damages claim that the rule forbidding private rights of action only bars damages in the courts, and allows damages to be recovered in the Commission. This argument is unsound. Congress barred “any private right of action,” not just some. Moreover, Congress would not have used the phrase “private right of action” to distinguish the courts from the Commission, since both forums are equally public; whether an action is “private” depends on the identity of the claimant.

Finally, if the only effect of the rule is to abolish so-called “private actions” in the courts, then the rule will have been given utterly no effect, since *all* actions in the courts *are already* barred by the rule stated in the very next sentence of Section 255(f) that “[t]he Commis-

sion shall have exclusive jurisdiction” over all Section 255 complaints. It is a fundamental rule of construction that effect must be given to all parts of a statute. If the rule against private actions applies only to bar litigation in the courts, while the courts are otherwise being barred from litigation anyway, it will have been made utterly superfluous; it might just as well have been omitted entirely. But only Congress has the power to expunge whole sentences from a law, and the Commission should take care to avoid making any such flawed and precariously reversible reading of Section 255.

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In its initial Comments on the issues raised in the Commission's recent Notice of Proposed Rulemaking (hereinafter referred to as the "Notice" or "NPRM")¹ in the above-entitled docket, Ameritech² recounted the conspicuous Ameritech record of service to the disabled community, both in regard to accessibility to telecommunications products and services and in the areas of volunteerism, grants and

¹ FCC 98-55, released April 20, 1998.

² Ameritech comprises five entities defined as Bell operating companies under the Telecommunications Act of 1996 — Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, Michigan Bell Telephone Company, The Ohio Bell Telephone Company, and Wisconsin Bell, Inc. — and other affiliates.

financial support, support of advocacy organizations, a commitment to workplace diversity, and an overall commitment to accessibility.³ Against that background, Ameritech was able to express complete agreement with the overall principles and goals of Section 255 of the Telecommunications Act of 1996 and to state Ameritech's support for the great majority of the findings and tentative conclusions of the Commission in its NPRM. This was subject, however, to the exception that Ameritech believes that the Commission's considerable array of powers available to enforce Section 255 does not include the power to award personal damages to individual claimants, since damages are barred by the crystal-clear Congressional directive in Section 255(f) that forbids "any private right of action." Accordingly, Ameritech urged the Commission to adopt procedures for formal complaints specifying that private claims for damages would not be allowed. These Reply Comments respond to the arguments of those who have taken contrary positions.

³ Comments of Ameritech, filed June 30, 1998, at 1-5.

I. The Rule Against Private Rights of Action Prohibits Individual Claims for Damages.

In discussing the remedies available for violations of Section 255, the NPRM (11 172) observed that “Sections 207 and 208 provide for the award of damages for violations by common carriers, and arguably others,” and accordingly the Commission sought comment on “the relationship between Sections 207 and 208 and Section 255.” In its opening Comments on June 30, Ameritech responded to this invitation by showing that neither Section 207 nor Section 208 could authorize private complaints for damages when Section 255(f) unambiguously requires that “[n]othing in this section shall be construed to authorize *any private right of action* to enforce *any requirement of this section* or any regulation thereunder” [emphasis added]. Ameritech also showed that the proviso could not be read so narrowly that only private rights of action *in the courts* would be barred, even while private rights of action *before the Commission* might still proceed, without reducing the proviso to superfluous triviality, since actions in the courts *are already* barred by the statute’s very next sentence.

Few among the many commenters took up the Commission’s direct invitation to discuss “the relationship between Sections 207

and 208 and Section 255.” Some, however, support the use of private claims for damages as an enforcement mechanism and, indeed, are already moving their sights beyond individual cases and into the realm of anticipated class actions. (However, no one who spoke out in support of private damages responded to the NPRM’s suggestion to “specifically address what circumstances would warrant imposition of damages where Section 255 is found to have been violated, and how such damages could be calculated.”⁴)

Self Help for Hard of Hearing People, Inc., (“SHHH”) says (at p. 20) that it “supports the Commission’s view that in vesting the agency with exclusive jurisdiction to undertake enforcement of Section 255, Congress intended that the agency’s full complement of enforcement powers would be available. These include Sections 207-208,312 and 501-504 of the Communications Act.” SHHH goes on to speculate (at p. 21) about the variety of class actions for damages that it believes might be available under Sections 207 and 208.

Another party supporting the right to private damages is the National Council on Disability (“NC,”), which says (at p. 4):

We also strongly support the Commission’s interpretation of the relationship between Sections 207-208 and Sec. 255. Secs. 207 and

⁴ NPRM at ¶ 172.

208 provide a number of remedies, including the award of monetary damages, against alleged violations of law by "common carriers." In concluding that Sec. 255 does not curtail or supersede the remedies previously established under Secs. 207-208, the Commission's analysis is wholly in accord with congressional intent and with the clear language of the statute.

Such assumptions about the so-called "clear language of the statute" are erroneous. They all too plainly hope to avoid the reach of the statute's interdiction against "private right[s] of action" by the mere device of wishfully pretending that those words do not exist. But that is not a correct reading of the law. There surely cannot be the same "full complement of enforcement powers" under Section 255 as in the rest of the Act, and that is because Section 255 is the only section containing the rule against private rights of action. Moreover, these commenters' attempts to find support in the legislative history, or to say that private rights of action are barred in the courts but not in the Commission, are invalid for the reasons shown below.

A. The Legislative History Does Not Support Actions for Damages.

Both SHHH and NCD claim to find support for actions for damages in the legislative history of Section 255. Such arguments all

point to the same passage in the Conference Report,' from which they quote only the fragment said to uphold their view, which says, "The remedies available under the Communications Act, including the provisions of sections 207 and 208, are available to enforce compliance with the provisions of section 255."

This resort to the record in Congress is far off the mark. First of all, the authorities make clear that legislative history is useful only where the statutory language is ambiguous to begin with. The Supreme Court, for example, has said, "[W]e do not resort to legislative history to cloud a statutory text that is clear."⁶ There is no ambiguity to be found in this case, however, because the two sentences in Section 255(f) around which the present controversy swirls are clearly not contradictory, but complementary:

(f) No ADDITIONAL PRIVATE RIGHTS AUTHORIZED.- Nothing in this section shall be construed to authorize any private right of action to enforce any requirement of this section or any regulation thereunder. The Commission shall have exclusive jurisdiction with respect to any complaint under this section.

⁵ H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess., at 135 (1996) says: The conferees deleted the provision in subsection (e) of the Senate bill creating roles for NTIA and NIST. In addition, the conferees adopted the provisions of section 249(d) of the House amendment, which states that nothing in this section authorizes any private rights of action. The remedies available under the Communications Act, including the provisions of sections 207 and 208, are available to enforce compliance with the provisions of section 255.

⁶ *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994).

It is easy to harmonize these two sentences by recognizing that the grant of exclusive jurisdiction to the Commission is not in conflict with the rule against private actions, but means merely that the Commission will hear all complaints *not* forbidden by that rule. Thus there is no statutory unclarity requiring any resort to legislative history in the first place.⁷

Moreover, even if Section 255 were ambiguous, its legislative history is too muddled and uncertain to be relied upon. In particular, the famously cited statement in the Conference Report that Sections 207 and 208 will remain available is manifestly erroneous. No one, certainly, could ever take it literally, since it is undisputed that Section 255 has abruptly ousted the courts of their former jurisdiction under Section 207. In fact, there is nothing left of

⁷ Of course it might be claimed that some ambiguity arises merely from the fact that Sections 207 and 208 remain in the statute even while Section 255 forbids private rights of action. But if *that* is the ambiguity, the Conference Report does nothing to clarify it, since it merely recites, in a repetitive, sing-song style, a synopsis of those statutory provisions — the availability of existing remedies, *and* the rule against private actions — without providing any further explanation. Thus the legislative history is, at best, no less ambiguous than the statute. See text from Conference Report quoted in note 5, *supra*. (Advocates of private damages, of course, ignore the part that says “the conferees adopted the provisions of section 249(d) of the House amendment, which states that nothing in this section authorizes any private rights of action.”)

Section 207 as far as the subject of disabilities is concerned.⁸ After being so wrong about Section 207, how could the Conference Report be right about Section 208? Thus, no matter what it says in the legislative history, Sections 207 and 208 are *not* fully preserved under Section 255, but remain subject to Section 255(f)'s unique conditions — including *both* its grant of exclusive jurisdiction to the Commission, which, as just noted, virtually eliminates Section 207, *and* its prohibition against private rights of action, which limits the usual scope of Section 208.

In sum, then, one needn't look for ambiguity in Section 255 itself, for the confused and mistaken clauses are all found in the Conference Report; in fact, this is just another one of those cases where "[i]ndeed, far from clarifying the statute, the legislative history only muddies the waters." Therefore the appeals some parties have made to the legislative history do not confirm their view that Congress intended for private damages to be available under Sections 207 or 208 in the

⁸ Section 207 provides only that actions may be brought in either the courts or the Commission, and that choice is plainly no longer available under Section 255.

⁹ *United States v. Gonzales*, 520 U.S. 1, 137 L. Ed. 2d 132, 139 (1997).

face of Section 255's firm prohibition forbidding "any private right of action."

B. Because All Parts of a Statute Must Be Given Effect, the Rule Against Private Actions Applies to the Commission, Not the Courts.

Commenters advocating a right to private damages also claim that the language barring "any private right of action" serves only to prohibit actions for damages in the courts, but not actions for damages before the Commission.¹⁰ But this contention is faulty for three reasons.

First, it ignores the plain language of Section 255(f): Congress has barred "any private right of action" — not just *some* of them. Second, it would drastically corrupt the plain meaning of the word "private"; can suits in the courts actually be, as this reading necessarily implies, *more* "private" than cases before the Commission? Congress surely cannot have intended such a peculiar usage of these words. Instead, it is apparent that whether a right of action is

¹⁰ This argument is, of course, very similar to that stated by the Commission in the NPRM (at ¶ 32): "The preclusion of *private litigation* in Section 255(f) compels complainants to seek redress exclusively from the Commission, rather than in Federal courts, but it does not prevent the filing of administrative complaints pursuant to Section 255" [italics by the Commission].

“private” or not must depend on who is the complainant, rather than what is the forum.”

There is a third fatal defect in the claim that the rule against private rights of action only applies to the courts: it openly violates the bedrock principle of statutory construction that all parts of a statute must be given effect. This is because the second sentence of Section 255(f) *already* provides that the Commission “shall have exclusive jurisdiction” of complaints under Section 255. This second sentence clearly bars the courts from hearing *any* complaints, whether or not they amount to private rights of action; accordingly, the *first* sentence, prohibiting private rights of action, if it applies only to the courts, would be completely redundant and unnecessary.

Read that way, of course, the law would make little sense. Indeed, it was just to avoid such anomalous outcomes that the courts developed the familiar rule that all parts of a statute must be given effect whenever possible. As the Supreme Court puts it, “Our cases express a deep reluctance to interpret a statutory provision so as to

¹¹ Section 208 itself says that relief may be sought by “any person,” on the one hand, or by “any body politic or municipal organization, or State commission,” on the other; the rule of Section 255 forbidding “any private right of action” for disabilities access claims would of course apply to abolish the *first* group of cases, but *not* the second.

render superfluous other provisions in the same enactment.”¹² Or, in the words of the D.C. Circuit, “An endlessly reiterated principle of statutory construction is that all words in a statute are to be assigned meaning, and nothing therein is to be construed as surplusage.”¹³

Applying the rule to the case at hand, if the bar against private actions is held to apply only to the courts, which are simultaneously being deprived of all disabilities jurisdiction anyway, it will have been construed as mere surplusage and given no effect at all — the same as if the very words of Congress had been erased from the pages of the law by some ghastly hand. That, of course, would glaringly breach the venerable rule of statutory construction under discussion; yet, on the other hand, any such infraction may easily be averted by simply directing the focus of the rule barring private actions away from the courts, where it would be useless, and *toward* the Commission, which under Section 255 will be the only forum with any jurisdiction to hear

¹² *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990).

¹³ *Lin Qi-Zhuo v. Meissner*, 70 F.3d 136, 139 (D.C. Cir. 1995). See also *Tobey v. NLRB*, 40 F.3d 469,471 (D.C. Cir. 1994) (“A fundamental principle of statutory construction mandates that we read statutes so as to render all of their provisions meaningful.”); *Davis County Solid Waste Management & Energy Recovery Special Service District v. United States Environmental Protection Agency*, 101 F.3d 1395, 1404 (D.C. Cir. 1996), *on rehearing*, 108 F.3d 1454 (D.C. Cir. 1997) (“The EPA’s approach essentially reads these different deadlines out of the statute, and it is of course a well-established maxim of statutory construction that courts should avoid interpretations that render a statutory provision superfluous.”).

telecommunications disabilities complaints. Consequently, in order to give meaning to all parts of the law, Section 255 must be interpreted to mean that private rights of action are not permitted anywhere, either in the courts *or* in the Commission.

To sum up, the rule that all parts of a statute must be given effect is a salutary judicial maxim of long standing and is directly pertinent to the main issue here. Under that rule, the only allowable construction of Section 255 is that Congress's rule against private rights of action doesn't just apply to the courts, where it would have no effect, but applies with full force to complaints before the Commission. Otherwise, the rule against private rights of action will have no purpose or function in the law at all. Therefore the Commission must make plain in its Rules applicable to Section 255 that claims for individual damages may not be brought,

C. Section 255 Provides the Commission Ample Enforcement Tools Even Without the Power To Award Damages.

Some parties assert in their initial Comments that enforcement of Section 255 will be impaired if there are no private actions for

damages.¹⁴ But this argument is weak. First of all, even if it were true, it is a point that ought to be addressed not to the Commission, but to Congress, which enacted the limitation against private actions as an integral part of Section 255. In addition, however, the fact is that observance of that prohibition will not materially decrease the Commission's power to enforce Section 255. As Ameritech pointed out in its opening Comments, even in the absence of the *adjudicative* power to award damages, the Commission will still be armed with its usual robust arsenal of *administrative* enforcement powers. This will include, of course, the power to adopt rules and regulations interpreting and enforcing Section 255. (Of course, the Commission has already tentatively concluded it may promulgate such regulations.¹⁵) It will also include the power to enforce those regulations by the usual means, including the forfeitures that may be sought by the Commission from "any person" under Section 503(b).¹⁶

¹⁴ For example, Malisa W. Janes, Rh.D. (at p. 1) states, "We need to retain our right to litigation as this may be the only way we ever get full access in our society."

¹⁵ NPRM (¶¶ 25-28). Ameritech, of course, fully supported this tentative conclusion in its initial Comments (pp. 6-7).

¹⁶ NPRM (¶ 172). Section 503(b)(1)(B), 47 U.S.C. § 503(b)(1)(B), provides: "Any person who is determined by the Commission . . . to have . . . willfully or repeatedly failed to comply with any of the provisions of this Act or of any rule, regulation, or order issued by the Commission under this Act . . . shall be liable to the United States for a forfeiture penalty."

In its exercise of these basic administrative enforcement powers, the Commission may of course act in response to the complaint of any person, public or private, and still remain in compliance with Section 255(f), so long as the complaint is pursuing a disabilities issue of general importance, rather than seeking to obtain specific personal monetary relief.

Furthermore, even in its adjudicative mode, the Commission would, consistently with Section 255(f), be able to hear any type of complaint against equipment manufacturers or telecommunications providers that was not within the scope of the Congressional prohibition against “any private right of action.” This would include, first of all, any kind of action by non-“private” entities; for example, several of the parties filing Comments in this rulemaking are public agencies that would be wholly unaffected by any rule against “private” proceedings.¹⁷ In addition, the Commission’s adjudicative jurisdiction could also, without running afoul of Section 255(f), include private complaints that do not ask to recover damages, but seek alternative forms of relief such as declaratory rulings; proceedings of that sort,

¹⁷ Among the numerous commenters may be found three federal and four state agencies that deal with disabilities.

whether brought by individual persons with disabilities, or by any of the many advocacy organizations that act in behalf of such persons, would not seem to be in violation of the rule against hearing “right[s] of action” stated in Section 255(f).

With this many arrows in its administrative and adjudicative quivers, the Commission will be well equipped to secure the benefits of Section 255 to persons with disabilities and to detect, deter, and punish violations of the law by errant manufacturers or service providers. At the same time, the Commission will be spared from the flood of individual complaints that would be sure to follow if personal claims for damages were to be allowed. In addition, and most important, the Commission’s enforcement powers will then conform to what was expressly granted by Congress, by giving proper effect to the explicit stricture against allowing “any private right of action.”

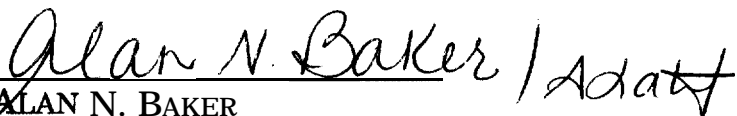
II. Conclusion

Notwithstanding the arguments advanced by some parties in the first round of comments in this rulemaking, Ameritech cannot read Section 255 to authorize private claims by individuals for damages arising out of disability issues. The legislative history does not support the argument for damages, since that history is really more

uncertain than the statute itself; moreover, the argument that the ban on damages applies only to the courts withers under scrutiny when the fact is that the courts' jurisdiction is being abolished anyway.

For the above and foregoing reasons, Ameritech renews its request that the Commission make clear that claims for private damages under Section 255 will not be permitted under its Rules.

Respectfully submitted,


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August 14, 1998

CERTIFICATE OF SERVICE

I, Edith Smith do hereby certify that a copy of foregoing
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